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No. 87-823

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICKY L. LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government was required to establish an independent source for the evidence against petitioner notwithstanding petitioner's failure at trial to demonstrate that he had previously testified under a grant of use immunity about matters that were related to his subsequent prosecution.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-5a) is reported at 25 M.J. 9. The opinion of the Air Force Court of Military Review (Pet. App. 6a-19a) is reported at 19 M.J. 773.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 21, 1987. The petition for a writ of certiorari was filed on November 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial before a military judge at Moody Air Force Base in Georgia, petitioner, a member of the United States Air Force, was convicted of the use, possession, and distribution of marijuana and

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cocaine, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934.[1] He was sentenced to three years' confinement, a dishonorable discharge, forfeitures of pay, and reduction in rank. The convening authority reduced the period of confinement and forfeitures to 32 months, but otherwise approved the findings and sentence.[2] Pet. App. 1a-2a. The Air Force Court of Military Review affirmed the findings and sentence (*id.* at 6a-19a). The Court of Military Appeals affirmed (*id.* at 1a-5a).

1. In 1983, petitioner became a suspect in an investigation of drug activities in and around Moody Air Force Base in Georgia (Pet. App. 7a-8a, 13a n.5). On October 13, petitioner gave a statement (PX 1) to Special Agent Law of the Air Force Office of Special Investigations (OSI) in which petitioner admitted to the possession, use, and distribution of marijuana, and to the possession and use of cocaine (*id.* at 7a). Petitioner also agreed to help the OSI identify other persons involved in drug activities. This cooperation continued until November 17, when petitioner sought use immunity before testifying as a potential prosecution witness in the case of *United States* v. *Aea.* The Commander of the Ninth Air Force (the convening authority in both Aea's and petitioner's trials), granted petitioner use immunity that day, and petitioner testified at Aea's trial (Pet. App. 7a).

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[1] Prior to August 1, 1984, drug offenses in the military were prosecuted and punished under Article 134, which is known as the General Article. Such offenses are now prosecuted under Article 112a, UCMJ, 10 U.S.C. (Supp. IV) 912a[redacted], which was added to the UCMJ by Section 8(a) of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1403. Petitioner's case was tried in April 1984 under Article 134.

[2] Under Article 60(c)(2), UCMJ, 10 U.S.C. (Supp. IV) 860(c)(2), the convening authority in his or her sole discretion may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the sentence. Para. 88a, *Manual for Courts-Martial, United States – 1969 (rev. ed.).*

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2. Petitioner's trial took place on April 12 and 13, 1984. The prosecutor, Captain Stephenson, was also the prosecutor in the *Aea* case (Pet. App. 7a). Neither petitioner, his attorneys, nor Captain Stephenson informed the trial judge of Stephenson's involvement in the *Aea* case, nor did petitioner allege or demonstrate that he had testified in that case under a grant of use immunity about matters relating to his subsequent prosecution (Tr. 4, 15-81).[3] Petitioner thereafter entered guilty pleas to specifications one through five of the charge, and a not guilty plea to specification six (Tr. 82). After a hearing, the trial judge accepted petitioner's guilty pleas and entered findings of guilty on the first five specifications (Tr. 97-98). The remainder of the trial was devoted to the last specification, number six, which alleged that petitioner had wrongfully distributed cocaine. At no time was any information adduced to put the trial judge on notice that petitioner had testified under a grant of immunity in the *Aea* case (Pet. App. 8a).

3. On appeal to the Air Force Court of Military Review, petitioner claimed for the first time that Stephenson's involvement in his trial constituted an impermissible derivative use of his prior immunized testimony (Pet. App. 7a-8a). The court held that petitioner waived his claim by failing to demonstrate at trial that his prior immunized testimony related to his later prosecution. The court also held that Stephenson's participation in peti-

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[3] The defense did move, without opposition, to dismiss specifications seven, eight and nine of the charge, on the ground that they were barred by the statute of limitations, and the trial judge granted the motion (Tr. 15). The judge also granted petitioner's motion to suppress his confession (PX 1), on the ground that it was obtained after an improperly induced waiver of his right to counsel (Tr. 81). Petitioner's confession was subsequently admitted as a prior inconsistent statement, however (Tr. 279). Petitioner does not challenge that ruling in this Court.

tioner's trial did not constitute plain error. *Id.* at 12a, 14a. The Court of Military Appeals affirmed (*id.* at 1a-5a). It held that the government is not required to establish an independent source for its proof in the absence of a defense claim that the government's evidence was derived from the defendant's prior immunized testimony. The court also found no plain error in this case (*id.* at 3a).

ARGUMENT

Petitioner argues that his convictions must be set aside because of the prosecutor's failure to disclose his involvement in the *Aea* prosecution, at which petitioner testified under a grant of use immunity. The prosecutor's failure to withdraw from this case requires reversal, petitioner contends, despite petitioner's failure to raise that claim in a timely manner before or at trial. That claim does not warrant review by this Court, for several reasons.

Petitioner has waived his claim, in two ways. Petitioner pleaded guilty to five specifications of the narcotics charge, both military appellate courts found that his pleas were not induced by the prosecutor's use of his prior testimony (Pet. App. 3a, 13a), and petitioner makes no such claim in this Court. Accordingly, petitioner has waived any claim that the government made any improper use of his immunized testimony in connection with those specifications. *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (a voluntary guilty plea waives claims of antecedent constitutional violations).

Petitioner failed to raise his Fifth Amendment claim in connection with the sixth specification. The military rules of procedure require a defendant to raise a Fifth Amendment objection to the government's evidence before he enters his plea, and the failure to do so constitutes a waiver of the claim absent "good cause" to excuse the default. Mil. R. Evid. 304(d)(2) and (e). The military courts have consistently held that objections based on an alleged vio-

lation of the Fifth Amendment privilege against compulsory self-incrimination may be waived by failing to object in a timely manner.[4] Petitioner should have asserted his claim that the prosecutor knew about petitioner's testimony in the *Aea* case before petitioner entered his not guilty plea to the sixth specification. Petitioner has therefore waived his claim absent good cause for his default, which petitioner has neither shown nor alleged in this Court.[5] Under these circumstances, petitioner cannot invoke the Fifth Amendment to challenge the government's proof of the last specification at trial.

In *Kastigar* v. *United States,* 406 U.S. 441 (1972), the Court upheld the constitutionality of the federal use immunity statute, 18 U.S.C. 6002, against the challenge that the statute violated the Fifth Amendment privilege against compulsory self-incrimination. The Court ruled that compelling testimony under a grant of use immunity is consistent with the Fifth Amendment privilege as long as the immunity is coextensive with the scope of the privilege. 406 U.S. at 453-459. In rejecting the claim that use immunity could never be coextensive with the Fifth Amendment privilege because of the difficulty of identifying "the subtle ways in which the compelled testimony may disadvantage a witness" (*id.* at 459), the Court held that once a defendant demonstrates that he testified under a grant of

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[4] *E.g., United States* v. *Yarborough,* 18 M.J. 452 (C.M.A. 1984); *United States* v. *Cross,* 14 C.M.A. 660, 34 C.M.R. 440 (1964); *United States* v. *Dial,* 9 C.M.A. 700, 26 C.M.R. 480 (1958).

[5] The Court of Military Appeals found it "almost inconceivable" that petitioner's defense attorneys were unaware that Stephenson prosecuted the *Aea* case (Pet. App. 4a), and the court of military review believed that petitioner's lawyers were "fully aware" of Stephenson's participation in that case (*id.* at 14a n.6). Petitioner candidly admits (Pet. 4) that the record does not reveal why he did not raise this issue at trial, and he offers no excuse for his default.

immunity about matters that are related to his subsequent prosecution, the burden shifts to the government to prove that the evidence it proposes to use was derived from legitimate, independent sources (*id.* at 460-462).

In *Pillsbury Co.* v. *Conboy,* 459 U.S. 248 (1983), the Court reiterated its ruling in *Kastigar* that the defendant bears the burden of establishing that he previously testified under a grant of use immunity about matters related to his prosecution before the government must establish an independent source for its evidence. As the Court put it, "once a defendant establishes that he has testified under a grant of immunity, 'the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony' " (*Conboy*, 459 U.S. at 255 (quoting *Kastigar,* 406 U.S. at 460)). In sum, there is little room for doubt that the mere fact that the defendant previously testified under immunity is not sufficient without more to require the prosecution to bear the heavy burden under *Kastigar* of establishing an independent source for its evidence. As the Court of Military Appeals correctly summarized (Pet. App. 3a), "[a]bsent some defense complaint, there is no reason to protract a trial by requiring the prosecution to establish a negative—namely, that it has not used information or evidence derived from the accused's immunized testimony."

That conclusion is consistent with the decisions of the other federal courts of appeals. Those courts have ruled that Fifth Amendment claims like petitioner's are deemed to be waived if the defendant fails to object at trial on the ground that he previously gave immunized testimony about matters related to his prosecution. *United States* v. *McDonnel,* 550 F.2d 1010, 1011-1012 (5th Cir.), cert. denied, 434 U.S. 835 (1977); *United States* v. *Keilly,* 445 F.2d 1285, 1287-1288 (2d Cir. 1971), cert. denied, 406 U.S. 962 (1972); cf. *United States* v. *Brimberry,* 744 F.2d

580, 584-585 (7th Cir. 1984). Petitioner has cited no decision to the contrary.[6]

Petitioner contends (Pet. 5) that Captain Stephenson's participation in the trial was plain error. The courts below found no basis for concluding that the government's proof that petitioner distributed cocaine was derived from petitioner's testimony in the *Aea* case, rather than from other sources (Pet. App. 3a, 13a), and petitioner does not challenge that conclusion. Instead, he urges the Court to adopt a per se rule forbidding a prosecutor from participating in a case once he has been exposed to a defendant's prior immunized testimony. There is no reason to assume that a prosecutor can never demonstrate that the government's proof stems from an independent source, however, and other federal courts have ruled that the prosecutor's access to the defendant's immunized grand jury testimony does not prevent the government as a matter of law from carrying its burden under *Kastigar. United States* v. *Pantone,* 634 F.2d 716, 720 (3d Cir. 1980); *In re Grand Jury (Vigil),* 524 F.2d 209, 219-220 (10th Cir. 1975), cert. dismissed, 425 U.S. 927 (1976). Petitioner's claim therefore warrants no further review.

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[6] None of the cases cited by petitioner involved the situation in this case, in which the defendant failed to raise the Fifth Amendment issue in the district court by asserting that his immunized testimony was being used against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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